U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 12Mar2002

CASE NO.: 2001-LHC-1122

OWCP NO.: 7-117769

IN THE MATTER OF

GERARD K. CHAIX
CLAIMANT

VS.

SGS CONTROL SERVICES, INC.
EMPLOYER

CNA INSURANCE COMPANY
CARRIER

APPEARANCES:
Arthur J. Brewster, Esq.
For Claimant

Colin Sherman, Esq.
Lance S. Ostendorf, Esq.
For Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Gerard K. Chaix (Claimant) against SGS Control Services, Inc. (Employer) and CNA Insurance Company (Carrier). The formal hearing was conducted at Metairie, Louisiana on

December 6, 2001. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-15 and Employer's Exhibits 1-28. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of injury/accident was March 7, 1990;
2. The injury/accident occurred in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on March 7, 1990;
5. An informal conference was held on May 14, 2001, recommendation of March 30, 2000;
6. Average weekly wage at the time of injury was $574.26;[3]
7. Temporary total disability and temporary partial disability is disputed;
8. Employer paid Claimant benefits including temporary total disability from March 8, 1990 to November 5, 1997 at $382.84 per week, and permanent partial disability from November 6, 1997 to November 26, 1997 at $229.51 per week. Total benefits paid is $162,213.17;
9. Medical benefits have been paid, totaling $47,709.35;
10. Claimant is permanently disabled, with a 30% impairment; and
11. Date of maximum medical improvement is April 20, 1993.

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through March 1, 2002.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

[3]*See* Claimant's Exhibit 2 and Employer's Exhibit 25, Claimant's wage records.

Unresolved Issues

The unresolved issues in this case are:

1. Section 8 (f) relief;
2. Entitlement to compensation;
3. Nature and extent of disability;
4. Entitlement to medical benefits and reimbursement;
5. Earning capacity; and
6. Attorney fees, penalties and interest.

Statement of the Evidence

Testimonial and Non Medical Evidence

Claimant testified he is married, has two children and resides in Louisiana. After receiving his highschool diploma, he worked as a laborer in various jobs, including mail sorter, vending machine attendant, water gauge inspector, and grain inspector.[4]

Claimant worked for Employer as a grain inspector. His duties included inspecting grain and the ships used in its transportation, sampling grain from each ship, lifting and carrying items weighing in excess of 75 pounds, and writing reports detailing his observations. Prior to his March 1990 accident, Claimant injured his back when lifting grain covers. During these periods, Employer authorized medical treatment and paid Claimant compensation while he was unable to work.

On March 7, 1990, while Claimant and his partner carried a 150 pound generator up a 60 foot ship gangway, he injured his back. He continued working and sought medical treatment by Drs. La Rocca and Billings. In 1991, Dr. Billings performed a back fusion at L5-S1. Dr. Billings continues to examine and treat Claimant every three months.[5] As a result of his March 1990 work-injury, Claimant has also been treated

[4]Claimant knows neither how to type nor how to operate a computer.

[5]Claimant's current medications include those prescribed by Drs. Billings and Glade: Oxycontin, Robaxin, Neurontin, Effexor, and Clonopin. Claimant has not been reimbursed by Carrier for any of these medications. He testified as a result of these medicines, he experiences long-term

by Dr. Nutik, an orthopedist, Dr. Levy, a neurologist, and Drs. Glade and Roniger, both psychiatrists.

Claimant testified that he and Medicare paid his medical expenses. Carrier initially reimbursed Claimant for Dr. Billings' expenses, but stopped reimbursement on August 30, 1995. Carrier has not reimbursed Claimant for any treatment provided by Dr. Glade, nor has Carrier reimbursed Claimant for a back brace and MRI, both prescribed by Dr. Billings.

Prior to and post March 1990, Claimant was involved in several non-work related accidents and injured his neck, left leg and shoulder. Dr. Billings treated Claimant's neck pain. Claimant never submitted Dr. Billings' medical bill concerning treatment of his neck to Carrier for reimbursement. Dr. Waguespack treated Claimant for his shoulder injury.[6] Claimant never submitted Dr. Waguespack's bill concerning treatment of his shoulder to Carrier for reimbursement.

Claimant testified Carla Seyler administered vocational tests, performed a labor market survey, and sent him a description of available minimum wage jobs. Claimant, however, never applied for these positions and has not worked since March 7, 1990.

Lucille Chaix

Lucille Chaix, Claimant's wife, testified that she is the record-keeper regarding Claimant's medical bills and reimbursement forms associated with Claimant's March 1990 injury. She also accompanies Claimant to his doctor's appointments. On July 15, 2001, Mrs. Chaix drove Claimant to the East Jefferson ER because Claimant experienced severe back pain and needed additional medication.

Patricia Ehlinger

Patricia Ehlinger was accepted as an expert in the field of vocational rehabilitation.[7] She is the branch manager at Crawford & Company Health Care

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memory loss, drowsiness, difficulty concentrating, and general confusion.

[6]Claimant testified he mentioned his shoulder pain to Dr. Billings during his regular visits, but stated Dr. Waguespack was the sole physician to treat his shoulder injury.

[7]*See* Employer's Exhibits 14, 26 and 26 supplement.

Management and has been employed by Crawford & Company the entire time vocational services were provided to Claimant. When Claimant was originally evaluated, Carla Seyler conducted the vocational assessment and Ms. Ehlinger was the vocational supervisor. Deby Bailey and Kathleen Falgoust were the next vocational counselors assigned to Claimant and Ms. Ehlinger was their direct supervisor.

The vocational counselors assigned to Claimant's case obtained his relevant histories, administered various vocational tests and reviewed his medical records. Ms. Ehlinger stated that Claimant had many transferrable skills from his previous jobs and is capable of working in a sedentary to light capacity.[8]

The first labor market survey was completed by Ms. Bailey on May 17, 1993. Several available jobs were identified within Claimant's medical restrictions, as assigned by Drs. Billings and Nutik. The available positions included collector, telemarketer, weigh station monitor and dispatcher, with wages ranging from $5 to $6.87 per hour.[9]

Ms. Bailey conducted a second labor market survey, dated July 26, 1994. Several available positions were identified within Claimant's restrictions, including meter reader, dispatcher, appointment clerk, front desk clerk, and collector.[10] Wages ranged from $4.50 to $7.50 per hour.[11]

Ms. Falgoust conducted a third labor market survey, dated April 20, 1998. Seven positions were identified as appropriate for Claimant, including collection clerk,

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[8]These transferrable skills included: the ability to organize and record numerical data correctly; the ability to classify and analyze documents; the ability to utilize language/math skills to follow instructions, make change and complete forms; and the ability to read and interpret meters, dials and gauges.

[9]This report did not detail the specific requirements of each position.

[10]Ms. Ehlinger agreed the position of meter reader exceeded Claimant's physical restrictions.

[11]While available positions were identified, neither was the actual employer identified, nor was there a written description of job duties.

inside sales representative, and sales technician.[12] Wages ranged from $6 to $8 an hour. Ms. Ehlinger noted this was the first labor market survey report to specifically list the employer's name and address, as well as job duties for each position.

A fourth labor market survey was performed by Ms. Falgoust on November 2, 2000. Several available positions were identified including collection clerk, telemarketer, dispatcher, and unarmed security guard.[13] Wages ranged from $6 to $7 per hour. A retroactive labor market survey from 1994 to 2000 was also performed. Ms. Ehlinger concluded that the kinds of jobs and wages previously identified in the 1993, 1994, and 1998 labor market surveys were available from 1994 through 2000.

The fifth labor market survey was performed on December 4, 2001. Identified available positions included order clerk, appointment setter, collector, unarmed security guard, cashier, parking lot cashier and maintenance dispatcher.[14] Wages ranged from $5.15 to $9 per hour.

Exhibits

Employer's Exhibits 1 and 4 are various Longshore forms. Employer's Exhibits 2, 3 and 27 are Employer's Section 8 (f) application and correspondence relating to Section 8(f). Employer's Exhibit 28 is correspondence between Claimant's and Employer's counsel.

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[12]Four of the identified jobs, including customer service representative, dispatcher, and shipping/receiving clerk, were not currently hiring, only accepting applications. Ms. Ehlinger agreed the duties of a shipping/receiving clerk exceeded Claimant's medical restrictions.

[13]Ms. Ehlinger testified computer skills were necessary for the positions of collection clerk and dispatcher.

[14]Ms. Ehlinger testified the jobs of maintenance dispatcher and collector required computer skills.

Medical Evidence

Dr. Stewart Altman

Employer's Exhibit 6 is the medical records of Dr. Stewart Altman, a general surgeon. Dr. Altman treated Claimant from March 24, 1988 through July 7, 1988. Claimant reported an automobile accident of March 12, 1988 with resulting neck pain, shoulder pain and headaches. After a physical examination, Dr. Altman diagnosed Claimant with a cervical spine sprain. Treatment included medication.

Dr. Edna Doyle

Employer's Exhibit 7 is the medical records of Dr. Edna Doyle, a physical therapist. Dr. Doyle treated Claimant from July 28, 1988 through March 15, 1990. Claimant reported an automobile accident of July 1988 with resulting neck pain and headaches. After a physical examination, Dr. Doyle diagnosed Claimant with a neck sprain. Treatment included physical therapy.

East Jefferson General Hospital

Employer's Exhibit 8 is the East Jefferson General Hospital Emergency Room record of February 10, 1989. Claimant reported back pain resulting from lifting a barge cover while at work. Claimant was diagnosed with back strain and treated with medication.[15]

Dr. Richard Levy

Employer's Exhibit 16 is the medical record of Dr. Richard Levy, a neurological surgeon. Dr. Levy treated Claimant on July 25, 1990. After obtaining Claimant's history and performing a physical examination, Dr. Levy opined Claimant was not neurologically impaired. Treatment included medication.

Dr. Gordon Nutik

Employer's Exhibit 24 is the deposition of Dr. Gordon Nutik, taken on November 28, 2001.[16] Dr. Nutik, an orthopedic surgeon, treated Claimant from June

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[15]Employer's Exhibit 9 is the result of the February 1989 radiology test: Claimant's lumbar had very mild generative change with osteophyte formations at L5; L5-S1 disc space narrowed slightly.

[16]Included were Dr. Nutik's medical records. *See also* Employer's Exhibits 5, 11,15, and 21.

1990 through October 2001. While he opined Claimant had a chronic problem with his low back, he believed Claimant capable of sedentary work.[17]

After examining Claimant and reviewing his prior medical records, Dr. Nutik opined that Claimant had a degenerative disc at L5-S1, prior to the March 1990 back injury.[18] He also stated that Claimant's March 1990 injury combined with his pre-existing back degeneration resulted in a more significant low back injury than the March 1990 injury would have caused alone. Finally, Dr. Nutik opined there was no change in Claimant's back condition following the July 1993 automobile accident.

Dr. Charles Billings

Employer's Exhibits 19-20 and Claimant's Exhibit 5 are the depositions of Dr. Charles Billings, taken on January 9, 1991, May 8, 1998 and October 13, 2000.[19] Dr. Billings is a board certified orthopedic surgeon. He treated Claimant from August 26, 1991 to the present. In August 1991, Dr. Billings took over Claimant's treatment from Dr. La Rocca, when Dr. La Rocca took a medical leave of absence. Claimant reported the March 7, 1990 work injury resulting in low back pain, radiating to his left leg. After a physical examination and reviewing prior diagnostic studies, Dr. Billings diagnosed Claimant with post traumatic lumbar disc and joint disease with probable disc herniation at the L5-S1 level. He opined the disc herniation was caused by the March 7, 1990 work accident and that Claimant had some significant pre-existing abnormality in his lumbar spine.[20] On November 14, 1991, Dr. Billings performed a lumbar laminectomy and discectomy at L5-S1, including stabilization of the lower

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[17]*See* Employer's Exhibit 13, Dr. Nutik approved sedentary jobs identified by Ms. Bailey, on August 26, 1994. *See* Employer's Exhibit 12, Claimant's work restriction evaluation, dated August 26, 1994:Claimant could sit for 8 hours; walk 2 hours; stand 3 hours; not allowed to bend, squat, climb, kneel, lift or twist; lift 0-10 pounds.

[18]A February 1989 x-ray showed a narrowing of discs at the L5 sacral level. In 1980, 1988, and 1989, Claimant injured his back when lifting grain covers.

[19]*See* Claimant's Exhibits 13, 15, 4 and Employer's Exhibits 10, 17, Dr. Billings' records and account statements. *See also* Claimant's Exhibits 6-8, prescription and mileage records.

[20]Claimant had back injuries in 1981 and 1989 from lifting barge covers.

segment. Dr. Billings opined Claimant reached MMI on April 20, 1993. He believed Claimant could return to working full time with restrictions in July 1994.[21]

Claimant was involved in numerous other non-work related accidents from July 1993 through September 1997. During this time, he injured his neck, right shoulder and continued experiencing back pain. Claimant was treated with medication. Dr. Billings stated the medication he prescribed was for Claimant's ongoing back pain, regardless of his other injuries. Dr. Billings opined there was no permanent change in Claimant's lumbar spine pathology as a result of the other accidents.

Following the November 1991 surgery, Dr. Billings continued re-evaluting Claimant, including MRIs and blood work, every two to four months, regardless of his other injuries. In 1998, he referred Claimant to Dr. Glade for a psychiatric evaluation for depression and chronic pain. In September 2000, Dr. Billings diagnosed Claimant with lumbar disc disease and recommended chronic pain management, a myelogram and CT scan.

Dr. Henry LaRocca

Employer's Exhibit 18 is pages 3 and 35 of the undated deposition of Dr. Henry LaRocca, a board certified orthopedic surgeon.[22] He stated Claimant's symptoms resulted from degenerative changes that occur over time combined with the March 1990 injury.

Dr. Richard Roniger

Employer's Exhibit 22 is the medical records of Dr. Richard Roniger, a psychiatrist.[23] On October 9, 2001, Dr. Roniger performed a psychiatric evaluation of Claimant. After obtaining Claimant's history, he opined Claimant was not disabled from a psychiatric standpoint.

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[21]Restrictions included no heavy lifting/repetitive bending/stooping; no prolonged sitting/ standing; lifting less than 20 pounds; sit/stand for 1 hour; walk for 0.5 miles.

[22]*See* Employer's Exhibit 27, the deposition of Dr. LaRocca, dated September 13, 1991.

[23]*See* Employer's Exhibit 23, Employer did not submit Dr. Roniger's deposition post trial.

Dr. Susan Glade

Claimant's Exhibit 10 is the deposition of Dr. Susan Glade, taken on October 24, 2001.[24] Dr. Glade is board certified in adult psychiatry. She treated Claimant from February 21, 1998 to the present.[25] In February 1998, Claimant complained of insomnia, anxiety and irascibility. After obtaining Claimant's history and performing a mental status examination, Dr. Glade diagnosed Claimant with adjustment disorder accompanied by anxiety and chronic pain syndrome. She defined adjustment disorder as "maladaptive reaction to a stressor causing tension, neverousness, and jitteriness, that predominates throughout the day." (CX 10, p. 10). Dr. Glade stated Claimant's stressors included the March 1990 back injury and the resulting consequences of loss of control, inability to work, loss of financial security, loss of normal body functioning and uncertainty about the future. Treatment included psychotherapy and medication management.

Claimant's symptoms throughout his course of treatment fluctuated. Overall, Claimant improved from a psychiatric standpoint. Dr. Glade believed Claimant's anxiety and effects were related to his March 1990 accident and not due to his subsequent non-work related accidents. Dr. Glade testified that all medication prescribed for Claimant was due to his March 1990 workers' compensation claim. She believed Claimant capable of working and placed no restrictions upon him. Dr. Glade's final diagnosis was anxiety disorder. Treatment included psychotherapy and medication management. She also recommend Claimant attend a pain management clinic.

Un-reimbursed medical expenses

Claimant's Exhibit 9 is an itemized list of expenses Claimant incurred while treated by Dr. Billings. From October 30, 1995 through August 28, 2000, Claimant's medication totaled $589.70 and his mileage to and from Dr. Billings' office totaled 315 miles.

Claimant's Exhibit 13 is an itemized list of expenses Claimant incurred while treated by Dr. Glade. From February 21, 1998 through November 15, 2001,

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[24]*See* Claimant's Exhibits 11-12, prescription and medication costs incurred by Claimant.

[25]Claimant was referred to Dr. Glade by Dr. Billings.

Claimant's medication totaled $1599.97 and his mileage to and from Dr. Billings' office totaled 700 miles.

Claimant's Exhibit 14 is an itemized list of miscellaneous expenses incurred by Claimant, totaling $627.15 and 123 miles.

Findings of Fact and Law

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on March 7, 1990 during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured himself while working for Employer. The extent, duration and disabling effects of that injury, however, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). In this instance, both parties stipulated in Joint Exhibit 1 that Claimant reached MMI on April 20, 1993. I accept this stipulation and find that any compensation awarded after this date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

The only two doctors to comment with regards to Claimant's ability to physically return to work were Drs. Billings and Nutik. Dr. Billings treated Claimant

from August 26, 1991 to the present. He performed back surgery in November 1991 and diagnosed Claimant with lumbar disc disease. Dr. Nutik treated Claimant from June 1990 through October 2001. He diagnosed Claimant with a degenerative disc. Both orthopedic surgeons agreed that Claimant was unable to physically return to his former employment as grain inspector following his March 7, 1990 back injury. Therefore, as Claimant cannot return to his former employment, he has established his prima facie case of total disability.

Drs. Billings and Nutik opined Claimant could physically return to sedentary work with restrictions in July and August 1994, respectively. These restrictions included no heavy lifting, repetitive bending, stooping, squatting, climbing, kneeling, lifting or twisting; walking for 2 hours or not longer than 0.5 miles; sitting and standing for 1 hour; and lifting from 0-10 pounds. Drs. Roniger and Glade both opined there was no psychological impairment to Claimant returning to work. While Claimant was released to return to work as early as July 1994, Employer was unable to identify suitable alternative employment until April 20, 1998.

While Employer presented two labor market surveys of May 1993 and July 1994, no description of job duties was provided with the identified available positions. As such, it was unclear as to whether the requirements of each position were within Claimant's restrictions, as assigned by both Drs. Nutik and Billings. The labor market survey of April 20, 1998 was the first labor market survey to identify the specific job requirements of each position. Seven positions were identified, six of which were within Claimant's assigned restrictions, including collection clerk, inside sales representative, sales technician, customer service representative, and dispatcher. Ms. Ehlinger testified the duties of a shipping/receiving clerk exceeded Claimant's medical restrictions. While the position of collection clerk recommended computer skills, the description stated there was on-the-job training and such skills were not required. Wages for the identified positions ranged from $6 to $8 per hour, 40 hours per week.

At trial, Claimant's counsel conceded Claimant was capable of earning perhaps the equivalent of 1990 minimum wage plus perhaps one dollar more per hour. Based on the evidence presented, I find Claimant's ability to be a little greater. On average, Employer has demonstrated, through the 1998 labor market survey, that Claimant is capable of earning between $6 and $8 per hour, or an average of $7 per hour. Working 40 hours per week at $7 per hour, Claimant is capable of earning

approximately $280 per week. Consequently, I find that as of April 20, 1998, Claimant had an earning capacity of $280 per week, prior to that time he was totally disabled.

In sum, I find Claimant to have been totally disabled from March 8, 1990 through April 19, 1998.[26] From April 20, 1998 and continuing, Claimant has been and continues to be partially disabled.

Medicals

Both parties submitted Joint Exhibit 2 with their post-hearing briefs. It listed the disputed medical expenses of prescription medication and office visits associated with Dr. Billings' treatment of Claimant. The medicals at issue, therefore, include the prescription medication and office visit expenses of Dr. Billings, mileage reimbursement to and from Dr. Billings' office, as well as reimbursement to Claimant and his health insurance carrier for those items already paid to Dr. Billings.

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

Section 907(d)(1) of the Act provides:

> An employee is not entitled to reimbursement of money which he paid for medical or other treatment of services unless: (A) his employer refused or neglected to provide them and the employee has complied with subsections (b) and (c) and the applicable regulations, or (B) the nature

[26]Claimant testified his last day of work was March 7, 1990.

> of the injury required the treatment and services and, although his employer, supervisor, or foreman knew of the injury, he neglected to provide or authorize them.

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

There is no dispute between the parties that Dr. Billings was authorized to treat Claimant. Employer, however, contends that some of Claimant's office visits with Dr. Billings were for the treatment of injuries other than his back, such as his neck, shoulder and finger. Employer also contends that certain medication prescribed by Dr. Billings was for these other injuries, and not for Claimant's back injury. Therefore, Employer refused to authorize payment for these office visits and prescription medication.

The disputed office visits to Dr. Billings are as follows: January 2, 1996; July 9, 1998; December 17, 1996; April 21, 1997; July 21, 1997; September 19, 1997; December 12, 1997; January 26, 1998; February 9, 1998; November 16, 1998; June 14, 1999; October 15, 1999; July 17, 2000 and September 21, 2001. Dr. Billings testified that these office visits were routine follow-up appointments following Claimant's November 1991 back surgery. While Claimant did complain of other injuries, including his neck, shoulder, finger and hip, Dr. Billings testified that all scheduled appointments were for the treatment of Claimant's ongoing back problem. In fact, he opined that Claimant's subsequent non-work related accidents had no impact on Claimant's back condition. All of the treatment provided to Claimant's back was solely the result of his March 7, 1990 work-injury. As there is no evidence to the contrary, I find these office visits to be both reasonable and necessary for the treatment of Claimant's March 1990 back injury. However, Claimant, in his post trial

brief, conceded that the September 19, 1997 visit was not related to his workers' compensation claim, and as such, Employer is not liable for this one office visit.

The dates of the disputed medication prescribed by Dr. Billings includes: August 30, 1995; September 21, 1995; October 19, 1995; November 17, 1995; December 19, 1995; January 3, 1996; February 3, 1996; March 6, 1996; July 9, 1996; August 2, 1996; August 24, 1996; September 14, 1996; December 21, 1996; January 14, 1997; January 21, 1997; February 3, 1997; February 26, 1997; March 25, 1997; April 18, 1997; May 20, 1997; July 21, 1997; August 23, 1997; September 13, 1997; October 6, 1997; October 11, 1997; October 30, 1997; November 21, 1997; December 4, 1997; December 12, 1997; December 16, 1997; January 5, 1998; January 24, 1998; March 3, 1999; March 29, 1999; April 28, 1999; June 1, 1999; January 15, 2000; and February 9, 2000. Dr. Billings testified that all of the medication he prescribed was for Claimant's ongoing back problem. He testified he would have prescribed this medication regardless of Claimant's other injuries. As no evidence was presented to the contrary, I find that all of these prescription medications are both reasonable and necessary for the treatment of Claimant's March 1990 back injury.

In sum, Employer is liable for the expenses associated with Dr. Billings' office visits, excluding the visit of September 19, 1997. Employer is also liable for the mileage Claimant incurred going to and from Dr. Billing's office from October 30, 1995 through September 21, 2001(except September 19, 1997), totaling 280 miles.[27] In addition, Employer is liable for the expenses associated with the medications prescribed by Dr. Billings. As Employer neglected to provide or authorize payment for either these visits or medication, Claimant is entitled to reimbursement of the monies he previously paid for his treatment. Employer is also responsible for all other medical expenses reasonably relating to Claimant's March 1990 injury.

As regards treatment by Dr. Glade, only Claimant mentioned this issue in his post-hearing brief. Claimant believed the expenses associated with Dr. Glade's treatment were undisputed. As Employer failed to address this issue, I infer that Dr. Glade's treatment and expenses are no longer disputed. However, even if Dr. Glade's expenses were still at issue, the evidence supports the finding that her treatment, including office visits, mileage and prescription medications, are both reasonable and necessary and relate solely to Claimant's March 1990 back injury. Therefore,

[27] 14 visits at 20 miles round trip equals 280 miles.

Employer would be liable for all of these expenses and future expenses reasonably related to Claimant's March 1990 injury.

As regards reimbursement to Claimant's health insurance carrier, the Board held in *Nooner v. Nat'l Steel and Shipbuilding Co.*, 19 BRBS 43 (1986), that an employer need only reimburse a claimant for his own out-of-pocket expenses for necessary medical care, not for care mistakenly paid for by private non-occupational insurers. The mistaken insurers must intervene and seek recovery for such payments. *Id.* at 46.

Section 8(f) Relief

Section 8(f) of the Act provides that an employer may limit its liability for compensation payments from permanent disability if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to the injury, but is a combination of both that injury and the existing permanent partial disability. *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983); *Brogden v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 40, 42 91983); *See also* H. R. Rep. NO. 92-1141, 92nd Cong. 2d. Sess. 8 (1972).

The purpose of Section 8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 839 (9th Cir. 1982). It is also well settled that the provisions of Section 8(f) are to be construed liberally in favor of the employer. *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977); *Johnson v. Bender Ship Repair, Inc.*, 8 BRBS 635 (1978).

A pre-existing permanent partial disability can be (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss a claimant because of a greatly increased risk of an employment-related accident and compensation liability. *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977); *Cononetz v. Pacific Fisherman, Inc.*, 11 BRBS 175 (1979); *Johnson v. Brady-Hamilton Stevedoring Co.*, 11 BRBS 427 (1979). Although the mere fact of a past injury does not establish a disability, the existence of a serious

and lasting disability does. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991).

In this instance, Drs. Billings and Nutik documented that Claimant previously injured his back when lifting barge covers in 1981, 1988 and 1989. Dr. LaRocca also documented a similar injury in 1980. Specifically, Dr. Nutik testified that Claimant had a degenerative disc at L5-S1 prior to his March 1990 back injury. The February 10, 1989 x-ray, following Claimant's work-injury, showed a narrowing of discs at L5. Additionally, Dr. Billings testified that Claimant, prior to his March 1990 back injury, had a significant pre-existing abnormality of his lumbar spine. Dr. Henry LaRocca also testified that Claimant's present condition resulted from degenerative changes that occurred over time combined with the March 1990 injury.

Consequently, I find that prior to his March 7, 1990 injury, Claimant suffered permanent partial disabilities to his back which would have given a reasonable employer pause prior to hiring Claimant. Claimant's degenerative and chronic conditions of his back created a greatly increased risk of an employment-related accident and compensation liability for Employer.

The second requirement for Section 8(f) relief is that the pre-existing work-related injury is manifest to employer. A pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 80-83 (1st Cir. 1992); *Lowry v. Williamette Iron and Steel Co.*, 11 BRBS 372 (1979). The existence or availability of record showing the impairment is sufficient notice to meet the manifest requirement. *Director v. Universal Terminal and Stevedoring Corp.*, 575 F.2d 453 (3d Cir. 1978); *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984). Further, virtually any objective evidence of the pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement, since it could alert the employer to the existence of a permanent partial disability. *Lowry*, 11 BRBS at 372; *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990).

Many records existed regarding Claimant's back condition prior to his March 7, 1990 work-injury which satisfy the manifestation element under the Act. First, as Claimant's three previous back injuries occurred while working for Employer, Employer knew at the time of each injury that Claimant had injured his back. Second,

the East Jefferson General Hospital emergency room record, dated February 10, 1989, diagnosed Claimant with back strain resulting from a work injury. Third, Drs. Billings' and Nutik's records noted that Claimant had injured his back while lifting grain covers in 1981, 1988 and 1989. Consequently, I find Claimant's prior back injuries were manifest to Employer, thereby satisfying the second requirement for Section 8(f) relief.

Lastly, an employer may obtain Section 8(f) relief where the combination of the worker's pre-existing disability or medical condition and his last employment-related injury result in a greater permanent disability than the worker would have incurred from the last injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991); *Director, OWCP v. Newport News and Shipbuilding and Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *Comparsi v. Matson Terminals, Inc.*, 16 BRBS 429 (1984). The key element is whether the work-related injury, when coupled with the prior disability, materially and substantially aggravated and contributed to the employee's permanent disability. *Dunkin v. Newport News Shipbuilding and Dry Dock Co.*, 15 BRBS 182, 183 (1982). *See also Hedges v. J. M. Martinac Shipbuilding Corp.*, 16 BRBS 474 (1984). Under this third requirement for Section 8(f) relief, it must be determined if a claimant's present disability results from a coalescence or combination of the most recent work-related injury and the prior permanent impairment of record. *Duncanson0Harrelson & Co. v. Director, OWCP*, 13 BRBS 308 (1981); *Furney v. Ingalls Shipbuilding Division, Litton Indus. Inc.*, 17 BRBS 99 (1984).

Dr. Nutik opined that Claimant's March 1990 back injury combined with his pre-existing back degeneration resulted in a more significant low back injury than the March 1990 injury would have caused alone. Dr. Billings also opined that Claimant's present condition was made more severe because of his significant pre-existing abnormality of the lumbar spine. Since there is no evidence to the contrary, I accept Drs. Nutik's and Billings' opinions and find that Claimant's present condition is the result of Claimant's March 1990 work-accident and pre-existing degenerative disc disease, and not simply his latest injury alone. Thus, having met each of the requirements, Employer is afforded Section 908(f) relief.

ORDER

It is hereby **ORDERED** that:

1. Employer/Carrier shall pay to Claimant temporary total disability compensation from March 8, 1990 through April 20, 1993, based on an average weekly wage of $574.26;

2. Employer/Carrier shall pay to Claimant permanent total disability compensation from April 21, 1993 through April 19, 1998, based upon the average weekly wage of $574.26, after which time, Employer/Carrier shall pay to Claimant permanent partial disability compensation from April 20, 1998 and continuing, based upon the average weekly wage of $574.26, reduced by Claimant's residual wage earning capacity of $221.20[28], provided, however, that after 104 weeks of permanent compensation payments the Special Fund shall become liable as provided by §8(f) of the Act;

3. Employer shall receive a credit for all benefits previously paid to Claimant;

4. Pursuant to Section 7 of the Act, Employer is liable for all reasonable and necessary medical expenses relating to Claimant's March 7, 1990 injury including: the expenses associated with the office visits to Dr. Billings (excluding the visit of September 19, 1997); the mileage incurred by Claimant driving to and from Dr. Billings' office, as well as for the medications prescribed by Dr. Billings; and the expenses associated with the treatment provided by Dr. Glade, including office visits, prescription medication and mileage to and from her office.

5. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

6. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132.

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[28]Mindful of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's March 1990 injury. The National Average Weekly Wage (NAWW) for March 1990 was $330.31, and the NAWW for April 1998 was $417.87. Thus, the 1990 NAWW was approximately 79 % of the 1998 NAWW. Therefore, the wages have been adjusted accordingly.

7. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 12th day of March 2002, at Metairie, Louisiana.

A
C. RICHARD AVERY
Administrative Law Judge

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